MOHAMED BIN MUSA v. DEPUTY PUBLIC PROSECUTOR

[O.Cr.J. (Ibrahim J.) July 27, 1971]

[Kota Bharu — Miscellaneous Criminal Application No. 2 of 1971]

Criminal Law and Procedure — Charge of being in possession of a pen-type pistol without licence or permit — Application to have sight of and inspect article — Whether essential in interest of justice — Arms Act, 1960, s. 3(1).

The applicant who was charged with the offence of having in his possession a pen-type pistol without a licence or permit, applied to have sight of and inspect the article that was "alleged to be a pistol". An earlier application by his counsel to the Deputy Public Prosecutor had been refused.

Held, dismissing the application: (1) there was no statutory provision by which the prosecution could be compelled to accede to the applicant's request. Moreover, since it was not the practice, the court must be satisfied that it was really essential in the interest of justice before it would compel the prosecution to do so;

(2) it was not essential for the applicant or his counsel or potential expert witness to have sight of or inspect the article first before a proper and full defence could be prepared by his counsel.

[**Editorial Note:** The applicant appealed to the Federal Court which found that as he had not been convicted it had no jurisdiction to hear and determine the appeal. See *post* p. 61.]

Case referred to:-

(1) *Public Prosecutor* v. *Teoh Choon Teck* [1963] M.L.J. 35.

MISCELLANEOUS APPLICATION.

C. Jegathesan for the applicant.

Dato Idris bin Yusoff (Legal Adviser, Kelantan) for the respondent.

Ibrahim J.: The applicant was charged in the sessions court in Kota Bharu in Criminal Case No. 5 of 1971 as follows:

"That you on 28.2.71 at about 5.45 p.m. at Kg. Bukit Marak Binjai, in the District of Kota Bharu, in the state of Kelantan, did have in your possession arm to wit, a pen-type pistol without an arms licence or arms permit in that behalf in contravention of section 3(1) of the Arms Act No. 21 of 1960 and thereby committed an offence punishable under section 9(a) of the said Act."

In this application he was asking for an order that "his counsel and he and in the company of Inche' Teo Kee Teong be at liberty to have sight of and inspect the article that is alleged to be a pistol." The application was supported by his affidavit (enclosure (2)) and affidavit of his counsel (enclosure (5)).

The application was made necessary as an earlier application by his counsel to the deputy public prosecutor dated 19th June 1967 to have sight of the article was refused on 23rd June 1971. Paragraphs 3-9 of his affidavit read as follows: —

"3. I have not been able to instruct my counsel fully and properly as he is not able to comprehend what it is that I have been in possession of that is alleged to be a pistol.

4. My counsel is of the opinion that this article is of such unusual design that he is unable to comprehend my instructions to him without first having sight of and inspecting the article.

5. By reason of certain specific instructions I have given my counsel finds it necessary to have sight of and inspect the article in order to enable him to prepare my defence properly and fully.

6. By being allowed sight of this alleged article the prosecution case will in no manner whatsoever be prejudiced.

7. My counsel advises me and I believe it to be true that by Justice it is not only meant that the accused person be accorded all facilities within reason to enable him to prepare and present his defence properly and fully but also that public interest and security be not put in jeopardy.

8. My counsel advises me and I verily believe it to be true that by having sight of and inspecting the alleged article no injustice whatsoever will be committed nor will public interest and security be compromised.

9. As the entire case turns on this alleged article it is a vital exhibit."

Paragraphs 4-10 of his counsel's affidavit read as follows: —

"4. The article which the accused is alleged to have been in possession of is specifically referred to in the charge as a pen-type pistol.

5. I am unable to comprehend the specific instructions the accused has given me for I as his counsel do not know what this article is (or how it looks) that is alleged to have been in the accused's possession in contravention of the Arms Act No. 21 of 1960.

6. As it is I am only able to guess that this article is of such sophisticated design that it passes at all times for a pen although it is alleged to be a pistol.

7. The specific instructions that the accused person has delivered unto me as to knowledge are such that I am put on inquiry as to what this sophisticated article looks like and what else in its sophistication it may be mistaken for.

8. I humbly and conscientiously am able to say that this is neither a frivolous nor vexatious application.

9. It is purely and solely designed to enable my client to avail himself of justice on the basis that:

Justice must not only be done but seen to be done.

10. If and in this particular it is certainly so my client cannot reach me in his attempts of description of this article which is alleged to be a fire-arm and I as his counsel cannot inspect this article in the company of an armourer of our choosing it is my most humble opinion that Justice will not be seen to be done."

The rest of that affidavit listed four cases involving arms or ammunition in which he had appeared in the two years preceding this case in none of which he experienced any difficulty in understanding the accused's instructions to show that his application was not frivolous or vexatious.

No authority was cited in support of the application except *Public Prosecutor* v. *Teoh Choon Teck*[1] where at page 36 Hepworth J. said:

"The accused's problem was that in order to be in a position to put forward the defence that these two signatures were in fact the signatures of the complainant it was essential for him to have available before the trial either the original cheque and letter or photostat copies of them to obtain the advice of his handwriting expert. He clearly needed to have that advice prior to the date of trial. If he was not given the opportunity prior to the date of trial then an application for an adjournment during the trial when the documents were put in evidence would be inevitable, an application which would have to be granted. The prosecution were not going to let this original letter and this original cheque out of their possession and from a purely practical point of view, assuming such handwriting expert was not in Penang, the only manner in which the accused could obtain his advice was either to bring the handwriting expert to Penang which would no doubt be very expensive or to obtain photostat copies of the document and send them to him. As these documents were specifically referred to in the charges and as it was essential for the accused to

have the originals or photostat copies in order for him properly to prepare his defence, which could not otherwise be prepared, it seems to me that the Public Prosecutor in order to ensure that justice was not only done but seen to be done should not have raised objections, on the particular facts of this case, to the defence being supplied with photostat copies of the letter and the cheque and also any other documents removed from his possession which he required for the furtherance of this defence, for example a letter or letters in the handwriting of the complainant."

The learned deputy opposed this application as it was not the practice for the prosecution to allow the accused and/or his counsel to have sight of any article before it was produced in court as an exhibit. Regarding the case cited by applicant's counsel he submitted that the facts in that case were entirely different from those in this case. He also submitted that the application was not necessary as the applicant and/or his counsel or his potential expert witness could have sight of the article and have it examined if necessary at an early stage of the trial when it would be produced as an exhibit.

There was no statutory provision by which the prosecution could be compelled to accede to the request of the applicant and since it was also not the practice the court must be satisfied that it was really essential in the interest of justice before it would compel the prosecution to do so. In the case referred to by the applicant's counsel where the accused was charged with two offences under section 465 of the Penal Code and the defence was that the signatures were in fact the signatures of the complainant Hepworth J. considered that it was essential for the accused to have a copy of the relevant documents to properly and fully prepare his defence. The facts in that case were different from those in this case where the applicant was charged with an offence under section 3(1) of the Arms Act, 1960, with possession of a pen-type pistol, allegedly an "arm" as defined in section 2 of the said Act and part of his defence as indicated in the two affidavits was that the article was not or appeared to be such that he did not know that it was an "arm". On the basis that those were the specific instructions he had given to his counsel I was not satisfied that it was really essential for him, his counsel or potential expert witness to have sight of or inspect the article first before a proper and full defence could be prepared by his counsel. The article would certainly be produced as an exhibit at an early stage of the trial and if necessary a short adjournment could be asked for to enable him, his counsel or expert witness to inspect it for purposes of substantiating his defence.

I therefore dismissed the application.

Application dismissed.

Solicitors: *Jega & Co.*

LEE WONG TIANG v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 11, 1971]

[Kuala Lumpur — Federal Court Criminal Appeal No. 27 of 1970]

Penal Code, ss. 85 and 86 — Murder — Defence of drunkeness — Unsworn statement — Comment by trial judge — Appeal against conviction — No merit or substance in appeal.

The appellant appealed against his conviction on a charge of murder. The defence of the appellant at the trial was that he did not know what he was doing because of intoxication. The appellant made a statement from the dock and a psychiatrist was called on his behalf. On appeal it was alleged that the summing up of the trial judge was more favourable to the prosecution than to the defence.

Held, dismissing the appeal: there was no merit or substance in the appeal. There was also no misdirection in the summing up of the trial judge.

FEDERAL COURT.

S. K. Lee for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Azmi L.P.: The appellant was convicted of murder and sentenced to death. The prosecution case against him was that he intentionally caused the death of a young woman Esther Chen in his house at Pontian on the night of July 6, 1969. The evidence relied upon in proof of this was largely circumstantial and the facts thereby established were as follows:

On May 31 the deceased transferred to the appellant all her coconut land about 100 acres in area. The deceased, unmarried, lived in her own house in Batu Pahat. The appellant lived with his wife and children in a house in Pontian. His friends and neighbours, all school teachers, lived in a house nearby. It would appear from the evidence that on the morning of July 6 the deceased was in Pontian and that sometime during the day she was seen with the appellant. This was admitted by the appellant in his statement from the dock. One of the school teachers had stated in evidence that he saw the figure of a woman entering the appellant's house at about 7.00 p.m. Early on the morning of July 7, Esther Chen was found dead on the roadside between Pontian and Batu Pahat. The appellant was arrested three days later. In the meantime the police discovered the identity of the deceased from the younger sister who had come from Singapore to keep an appointment with the deceased to discuss the younger sister's share in the land which had been transferred to the appellant. There was also incriminating evidence suggesting that having killed the deceased in his house the appellant took the body in his car to the spot where it was later found.

The accused did not deny the killing. His defence was that he did not know what he was doing by reason of intoxication. It was a defence under sections 85(ii)(b) and 86(ii) which provide as follows: —

"85(i)....

(ii) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was do-